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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN A. HENDERSON,

Defendant and Appellant.

B296353

(Los Angeles County
Super. Ct. No. BA460772)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald S. Coen, Judge. Affirmed and remanded with directions.

Patricia Ihara, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Acting Senior Assistant Attorney General, Michael R. Johnsen and Yun K. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellant John Henderson of one count of first degree murder (Pen. Code, § 187, subd. (a)) and one count of being a felon in possession of a firearm (Pen. Code, § 29800, subd. (a)(1)). The jury found true the allegation appellant personally and intentionally discharged a firearm causing death. (Pen. Code, § 12022.53, subds. (b), (c), & (d).) The trial court found true the allegations appellant had three prior serious felony convictions. (Pen. Code, §§ 667, subds. (a)(1) & (d), 1170.12, subd. (b).) The court sentenced appellant to a total of 115 years to life: a base term of 25 years to life for the murder conviction, tripled to 75 years to life pursuant to the three strikes law; three 5-year terms pursuant to Penal Code section 667, subdivision (a)(1); and a term of 25 years to life for the firearm allegation. The court imposed a concurrent term of four years for the felon in possession of a firearm conviction.

Appellant appeals from the judgment of conviction, contending 1) the trial court erred in failing to instruct the jury sua sponte on the lesser offense of voluntary manslaughter on a heat of passion theory; 2) counsel was ineffective in failing to request an instruction on provocation that reduces murder to manslaughter; 3) the trial court abused its discretion under Evidence Code sections 1103 and 352¹ when it permitted the People to impeach appellant and show a character trait for violence with evidence of his 1988 conviction of two counts of attempted murder; 4) counsel was ineffective in addressing this evidence after the trial court made its ruling; and 5) counsel was

¹ Further undesignated statutory references are to the Evidence Code.

ineffective in addressing evidence of a prosecution witness's prior convictions and police body camera footage, both of which the prosecution belatedly disclosed during trial. Appellant makes seven additional claims of ineffective assistance of counsel, largely to support his separate claim that cumulative error was prejudicial. Finally, appellant contends the trial court incorrectly calculated his total sentence. Respondent agrees the trial court erred in sentencing appellant to 115 years to life instead of 100 years to life plus 15 years. We agree the sentence is incorrect and remand for the limited purpose of correcting the abstract of judgment. We affirm the judgment of conviction in all other respects.

BACKGROUND

In September 2017, appellant and his wife Octavia Rogers lived on 83rd Street in Los Angeles. The street was narrow at their address and parking was permitted on only the other side of the street. Valencia Pitts (Valencia) lived on the side which had parking. Residents of the block sometimes put out traffic cones to reserve parking spaces on the street.

Sometime in August 2017, appellant's daughter came to visit Rogers and discovered cones were blocking the available parking. Rogers had moved such cones in the past without problems, but when her daughter tried to move the cones she had an "altercation" with Valencia.² Valencia later acknowledged she did not want the daughter to park in the spot. Appellant was away on business when the incident occurred.

² Rogers and the daughter did not testify at trial. Valencia and appellant testified about the altercation and its aftermath.

On September 4, 2017, Valencia planned to hold a Labor Day barbeque with her family in the afternoon. Valencia's mother Robin Pitts (Robin) and her brother Charles Young came by Valencia's house around 9 or 10 a.m. and then left to obtain party supplies. Young was 25 years old, weighed about 250 pounds, and was six feet tall. He was built like a football player. Young was wearing a white shirt and red shorts. Valencia denied Young was a gang member. She explained Young was from Ocean, California, where he could wear any color he wanted without worrying about being shot.³

Valencia acknowledged Young had been photographed making what appeared to be West Side gang gestures, but stated that in her experience people make gang signs all the time without being gang members. The photograph in question was apparently taken when Young was in elementary school. When shown a photograph at trial of a Chicago Bulls cap, a heavy gold chain, a watch and a gun, Valencia denied the objects belonged to Young. Valencia acknowledged her brother wore jewelry, including chains, and one of the chains he was wearing in one of the photographs looked similar to the chain shown with the caps.

Soon after Robin and Young left Valencia's house to obtain party supplies, appellant and Rogers decided to discuss the parking issue with Valencia and her next-door neighbors Joey and Traci.⁴ Valencia had lived on the street for a year and one-half and had never met appellant or his wife.

³ This was an apparent reference to the fact that members of Blood gangs frequently wear red.

⁴ Joey and Traci did not testify at trial.

Valencia testified she explained to Rogers she had put out parking cones on the day in question to save a spot for a family member who was helping with a family emergency. She said this was the first time she had used the cones; it was Traci who usually put them out. She said Rogers's daughter responded by saying she would run over Valencia if she did not move the cones. Appellant then said it was illegal to save parking spaces and he, too, would have run over her. Traci and Joey told appellant to leave Valencia alone because she was pregnant. Appellant responded by yelling at Valencia and telling her to act her age. Joey moved from his yard toward appellant and appellant backed off across the street. At her neighbors' suggestion, Valencia called her mother Robin and told Robin appellant was bothering her, which made her feel unsafe.

Robin and Young returned. Valencia was crying and said a man had been beating on her door "talking about a parking spot" and saying "he would run her over." Robin asked Valencia where the man was. Valencia replied, "You have no idea what's going on." She pointed down the street toward appellant, who was near his van in his driveway.

Robin and Young walked toward appellant; Valencia followed at a distance. According to both women, appellant said he could not talk to both Robin and Young. Robin told appellant, "Talk to me." Young started to speak, saying "because my sister." Valencia heard appellant say, "Oh I got something for you youngster" and then he began shooting at Young. Robin heard appellant say, "Look, youngster," and saw him pull up his shirt, retrieve his gun, and begin shooting. Robin ran and did not see the remainder of the incident.

Young fell to the ground. Appellant walked up to Young and continued shooting at him. Dwayne McGowan, who lived up the street, heard gunshots, saw Young “fleeing”, heard another shot, saw Young fall to the ground, and then saw appellant run to Young, stand over him, and fire three to four more shots at Young while Young was on the ground. Before the shooting, McGowan did not hear argument or yelling.

In addition to hearing this eyewitness testimony, the jury viewed surveillance video of the shooting. The video came from a day care center across the street from appellant’s house. The video shows Robin and Young walking across the street towards appellant’s house. Appellant’s van is shown parked in his driveway. Robin is behind Young, but as Young reaches the sidewalk of appellant’s neighbor, Robin runs past Young. The video shows appellant, previously blocked from view by the van, appear. Appellant is holding a gun with his arms stretched toward Young. The video shows Robin moving toward appellant, who moves past her toward Young. Young makes an arm or upper body movement. Appellant fires at Young, who falls to the ground on his back. Appellant then moves closer to Young and stands over him. Young’s hands are covering his head as appellant fires three more shots into Young’s head. Appellant paces for a few steps and then returns to his van.

Both Robin and McGowan testified they heard someone tell appellant he should leave. McGowan testified appellant stood around “like he was in shock” and then left. The FBI arrested appellant in Cleveland a month later.

Young died from his gunshot wounds. He sustained one wound in his shoulder, one in his lower back and three in his head. The bullets which inflicted the shoulder wound and lower

back wound entered Young's body from behind. One of the head wounds was the "most rapidly" fatal. There were metabolites of methamphetamine and marijuana in his blood.

At trial, appellant's friend and neighbor Mikal Majeed testified as a defense witness. Shortly before the shooting, he heard a man yelling about someone disrespecting his sister. Majeed looked out the door of his house and saw Young walking aggressively across the street looking like he was spoiling for a fight. Majeed lost sight of Young, then heard gunshots. (In rebuttal, Los Angeles Police Officer Erick Sandoval testified that on the day of the shooting Majeed told officers he was in the back of the house.)

Appellant's nephew Mark Henderson, Jr., also testified on appellant's behalf. He recounted that when he was about 16 years old, he and appellant were attacked and beaten by gang members. Mark's head was cracked open and appellant needed a cast for his leg.

Appellant also called Detective David Dilkes as a witness. Detective Dilkes had investigated the shooting. He testified that when he viewed the crime scene there was a cane on the ground near the door of appellant's van. Detective Dilkes verified the presence of the cane in one of the crime scene photographs.

After the court ruled that details of appellant's prior convictions were admissible pursuant to section 1103 to show appellant's character trait for violence, appellant called gang expert Dana Orent, a retired law enforcement officer. Orent had reviewed photographs showing Young wearing red, throwing gang signs, and posting a photograph of a gun. Based on the photographs, Orent opined Young was "an associate of some sort"

with a Bloods gang. Without more evidence, Orent could not conclude Young was a gang member.

Detective Dilkes had also investigated whether Young was a gang member, but determined the evidence was insufficient to make such a determination. He testified skateboarders make generic West Side hand gestures and rappers wear big jewelry and like guns. Many people wear Chicago Bulls hats because they like the team. Young did not have any gang tattoos.

Appellant testified on his own behalf. He acknowledged he had suffered three prior convictions for armed robbery and two prior convictions for attempted murder. The three armed robberies took place in 1981 when appellant was 22 years old; he and some companions robbed the patrons of a bar. In 1986, after he was released from prison, appellant was convicted of the two counts of attempted murder, after he and a friend were drinking and using drugs and got into a “disagreement or argument that went bad.” There was “a fight with knives” and “a stabbing.” Appellant stabbed not only the person with whom he was having a fight, but also a woman who attempted to intervene to stop the altercation. Appellant turned to religion in prison and converted to Islam. He studied and learned and cleaned himself up. His religious beliefs helped him in prison and outside after his release. He had not had any contact with law enforcement between his release from prison in 1999 and the present incident. He was 57-years-old at the time of the events in this case.

After appellant got out of prison, he married Rogers. They saved their money and bought the house on 83rd Street. At some point, appellant started his own business selling sports apparel and memorabilia. He drove around the country to major sporting events to sell his merchandise. About three weeks before the

shooting he began using a cane “again.” His leg had previously been injured in the gang beating described by his nephew.

Appellant testified he was not hostile toward Valencia and did not threaten her during the discussion about parking spots. He did not go onto her porch or bang on her door. She nevertheless became angry and Rogers and Traci, who did not testify, tried to calm her down. Valencia took out her cell phone and said she was going to get a man “to deal with” appellant. Joey pulled appellant away to talk, and appellant then went home.

Appellant stayed outside working on his van because he was worried about Valencia’s phone call and wanted to keep an eye on the street. As he was cleaning out the van, he saw a car pull up and became nervous. He heard Young yell, “Hey, hey” and saw Young crossing the street. Appellant moved from the rear of his van to the side door.

Young yelled, “Were you over here messing with my sister?” He was very loud. Appellant replied, “Man, that’s over with.” Young said, “My sister said you was over here fucking with her.” Appellant felt afraid when he saw Young and a big woman crossing the street toward him and yelling. He grabbed his gun, which was in the seat of his van. Appellant kept the gun underneath the seat for protection when he traveled because his business was cash based. To appellant, Young appeared very aggressive and very angry. He was very big and looked like he could have been a football player. Appellant was “fearful.”

Appellant said, “There is two sides to every story.” Young responded, “It’s two sides to every story” and “I’m going to teach you about fucking with my sister.” Young said he was going to fuck appellant up. Young moved his right hand back like he was

going for a weapon. Appellant began shooting. He believed Young was going for a weapon and was going to hurt him. Appellant acknowledged he did not “wait to see a weapon” before firing.

Appellant went “dark” after firing the first shot. He did not know how many shots he fired. He just wanted to stop Young from hurting him or his wife who was inside their house. After the shooting, he was stunned and in a daze. He wondered if this was really happening. He was not trying to kill Young, he was “merely just trying to stop him from harming me.”

One of his neighbors came over, and appellant asked him to take the gun and drive him away. The neighbor declined. Appellant was afraid of gang retaliation because his daughter had warned him that Valencia’s house had a lot of gang traffic. He drove himself to Cleveland, Ohio where he had family members. He originally planned to turn himself in, but then changed his appearance because he did not want to get caught.

DISCUSSION

I. *Any Error in Failing to Instruct the Jury on Heat of Passion Voluntary Manslaughter Was Harmless.*

The trial court instructed the jury on first degree murder, second degree murder, and voluntary manslaughter based on an actual but unreasonable belief in the need for self-defense (imperfect self-defense). The trial court also instructed the jury that self-defense was a complete defense to the murder charges. Appellant contends substantial evidence supported an instruction on voluntary manslaughter based on heat of passion, arguing the trial court had a sua sponte duty to instruct on that theory. We disagree, but assuming for the sake of argument that the trial court erred in failing to instruct on this theory, we conclude there

is no reasonable probability the jury would have convicted appellant of manslaughter had it been instructed on this theory.

The trial court has a sua sponte duty to instruct on a lesser included offense if there is substantial evidence the defendant is guilty of the lesser offense, but not the charged offense. “This standard requires instructions on a lesser included offense whenever “ ‘a jury composed of reasonable [persons] *could* . . . *conclude*[]’ ” that the lesser, but not the greater, offense was committed. [Citations.] In deciding whether evidence is “substantial” in this context, a court determines only its bare legal sufficiency, not its weight.’ ” (*People v. Moye* (2009) 47 Cal.4th 537, 556 (*Moye*).)

Heat of passion has two elements, one objective and one subjective. (*People v. Manriquez* (2005) 37 Cal.4th 547, 584.) Objectively, the defendant’s heat of passion must be due to “ ‘ ‘ ‘sufficient provocation.’ ” ’ ” (*Moye, supra*, 47 Cal.4th at p. 549.) The provocation must be such as to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection (*id.* at pp. 549–550) and from such passion rather than from judgment. (*People v. Barton* (1995) 12 Cal.4th 186, 201.) “[A] voluntary manslaughter instruction is not warranted where the act that allegedly provoked the killing was no more than taunting words, a technical battery, or slight touching.” (*People v. Gutierrez* (2009) 45 Cal.4th 789, 826 (*Gutierrez*).)

The evidence is insufficient to show provocation. At most the evidence showed that Young was younger and more muscular than appellant, walked toward him “aggressive[ly]” and said he was going to teach him a lesson and “fuck him up.” (See *Gutierrez, supra*, 45 Cal.4th at pp. 826–827 [insufficient evidence

of provocation to support voluntary manslaughter instruction where defendant told victim to “[g]et off me, you f . . . ing bitch,” and she “‘cuss[ed] back at’” him; victim scratched defendant’s chest, kicked him in the leg and grabbed his shirt[.] In response to the verbal taunting, appellant pointed his gun at Young, who responded by first reaching back and then extending his arm toward appellant. This movement is captured on video and there is no indication of a weapon in Young’s hand as he reaches out toward appellant. No weapon was found at the crime scene. Thus, it is undisputed that Young did not have a weapon. Objectively, Young’s arm movement was at most an attempt to assault appellant with his hands; simple assault generally does not rise to the level of provocation sufficient to support a voluntary manslaughter instruction. (*Id.* at p. 827.)

Assuming for the sake of argument that the trial court erred in failing to instruct the jury on heat of passion voluntary manslaughter, reversal is not required. “[A] determination that a duty arose to give instructions on a lesser included offense, and that the omission of such instructions in whole or in part was error, does not resolve the question whether the error was prejudicial. Application of the *Watson*⁵ standard of appellate review may disclose that, though error occurred, it was harmless.’” (*Moye, supra*, 47 Cal.4th at p. 556.) Under *Watson*, the trial court’s judgment may be overturned only if “it is reasonably probable that a result more favorable to the [defendant] would have been reached in the absence of the error.” (*Watson, supra*, 46 Cal.2d at p. 836.)

⁵ *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*).

“In determining whether there was prejudice, the entire record should be examined, including the facts and the instructions, the arguments of counsel, any communications from the jury during deliberations, and the entire verdict.” (*People v. Guiton* (1993) 4 Cal.4th 1116, 1130.) We focus on what a reasonable “jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result.’” (*Moye, supra*, 47 Cal.4th at p. 556.)

Here, the jury found appellant guilty of premeditated first degree murder and thus unequivocally rejected appellant’s claims that he acted in perfect or imperfect self-defense. Under the instructions given on premeditated murder, the jury also necessarily rejected any evidence appellant acted in the heat of passion. CALJIC No. 8.20 directed the jury that to find appellant guilty of first degree premeditated murder, it had to find that “the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and *not under a sudden heat of passion or other condition precluding the idea of deliberation.*” (Italics added.) The jury was also required to find the killing did not result from “a mere unconsidered and rash impulse” but from a “cold, calculated judgment and decision.” Thus, in convicting appellant of first degree murder, the jury considered and rejected a finding that he acted rashly or from passion. If the jury had

found passion or rashness, the jury, at most, would have convicted appellant of second degree murder.

Appellant acknowledges the evidence he has identified in support of heat of passion voluntary manslaughter is the same evidence that supported his self-defense claims. But the jury rejected that evidence when it found malice. (See *Moye, supra*, 47 Cal.4th at p. 557 [finding failure to instruct on heat of passion voluntary manslaughter harmless because among other things, “[o]nce the jury rejected defendant’s claims of reasonable and imperfect self-defense, there was little if any independent evidence remaining to support his further claim that he killed in the heat of passion . . . or acted rashly or impulsively while under its influence for reasons *unrelated* to his perceived need for self-defense.” (Italics added.)])

At the same time, the evidence supporting first degree murder was strong. Generally, we consider “a tripartite framework—(1) planning activity, (2) motive, and (3) manner of the killing” to assess the strength of the evidence showing premeditation (*People v. Felix* (2009) 172 Cal.App.4th 1618, 1626 [all three factors need not be present, however, and list is not exhaustive].) Here, appellant testified he remained outside even though he was concerned about Valencia’s phone call; appellant moved from the rear of the van to the front door area where his handgun was located. This supports an inference of planning and thus premeditation. The video of the shooting itself shows appellant standing over Young and shooting him in the head as the victim lay wounded on the ground. Whatever appellant may have initially believed about Young having a weapon, Young’s hands were holding onto his head as he lay on the ground, thus

clearly showing he was not armed at that point. This deliberate manner of killing strongly supports premeditation.

In addition, appellant fled the scene almost immediately after the shooting, gave an inconsistent explanation for his flight, and changed his appearance to avoid capture. This is strong circumstantial evidence showing consciousness of guilt.

We do not agree with appellant that the instructional error removed an element of murder from the jury's consideration and so amounted to a denial of his federal right to due process. He relies on *People v. Thomas* (2013) 218 Cal.App.4th 630 (*Thomas*) to support this claim. The *Thomas* court reasoned that when "manslaughter and murder are considered in the same case, provocation and sudden quarrel are not elements of voluntary manslaughter." (*Id.* at p. 643.) The court explained: "When malice is an element of murder and heat of passion or sudden provocation is put in issue, the federal due process clause requires the prosecution to prove its absence beyond a reasonable doubt. (*Mullaney v. Wilbur* (1975) 421 U.S. 684, 704 [44 L.Ed.2d 508, 95 S.Ct. 1881].) Thus, in California, when a defendant puts provocation in issue by some showing that is sufficient to raise a reasonable doubt whether a murder was committed, it is incumbent on the prosecution to prove malice beyond a reasonable doubt by proving that sufficient provocation was lacking. (*People v. Rios* [(2000)] 23 Cal.4th [450,] 461–462 [citing *Mullaney*].) *Mullaney* compels that failing to so instruct the jury is an error of federal constitutional dimension. (Cf. *Patterson v. New York* (1977) 432 U.S. 197 [53 L.Ed.2d 281, 97 S.Ct. 2319].)" (*Thomas*, at p. 643.)

The *Thomas* court acknowledged that the California Supreme Court's opinion in *People v. Breverman* (1998) 19 Cal.4th 142 "holds that a failure to instruct sua sponte on voluntary manslaughter as a lesser necessarily included offense is reviewed under *Watson* because, primarily, '[t]he sua sponte duty to instruct fully on all lesser included offenses suggested by the evidence arises from California law alone.' (*Breverman*, at p. 149.) But this case concerns the court's duty to give a requested instruction, not the sua sponte duty to instruct at issue in *Breverman*." (*Thomas, supra*, 218 Cal.App.4th at p. 644.) The Fourth District Court of Appeal has held that *Thomas* only applies to cases where the defendant has requested a manslaughter instruction. (*People v. McShane* (2019) 36 Cal.App.5th 245, 257, fn. 4.) The First District Court of Appeal has stated that the full import of *Thomas* is not clear. (*People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1146.) We take no position on the matter, but note that no published case has applied *Thomas* to a trial court's failure to fulfill its sua sponte duty to instruct on voluntary manslaughter.

Assuming for the sake of argument that the omission was one of federal constitutional error and so reviewable under *Chapman v. California* (1967) 386 U.S. 18, we find the error harmless beyond a reasonable doubt, for the reasons set forth in our *Watson* analysis. Given appellant's heavy reliance on *Thomas*, we note the defendant in *Thomas* was convicted of second degree murder and so the verdict did not indicate a clear jury finding on the defendant's mental state. The same was true in *Breverman*, upon which appellant also relies.

II. *Counsel Was Not Ineffective in Failing to Request CALJIC No. 8.73 or a Similar Instruction.*

Appellant contends his trial counsel was ineffective in failing to request CALJIC No. 8.73, which states: “If the evidence establishes that there was provocation which played a part in inducing an unlawful killing of a human being, but the provocation was not sufficient to reduce the homicide to manslaughter, you should consider the provocation for the bearing it may have on whether the defendant killed with or without deliberation and premeditation.”

This instruction is meant to be given when the jury is instructed on voluntary manslaughter based on a heat of passion theory and so would not have been appropriate in this case, where the jury was not so instructed. We will treat appellant’s argument as faulting counsel for failing to request a pinpoint instruction telling the jury that it could consider whether any provocative conduct by the victim had a bearing on whether appellant killed with or without deliberation and premeditation.

A defendant has the burden of proving he received ineffective assistance of counsel. (*People v. Pope* (1979) 23 Cal.3d 412, 425.) To establish such a claim, defendant must show that his counsel’s performance fell below an objective standard of reasonableness. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694; *People v. Ledesma* (1987) 43 Cal.3d 171, 216–218.) “ “ “Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’ ” ” (*People v. Thomas*

(1992) 2 Cal.4th 489, 530–531.) “If the record ‘sheds no light on why counsel acted or failed to act in the manner challenged,’ an appellate claim of ineffective assistance of counsel must be rejected ‘unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.’” (*People v. Ledesma* (2006) 39 Cal.4th 641, 746.)

“If a defendant meets the burden of establishing that counsel’s performance was deficient, he or she also must show that counsel’s deficiencies resulted in prejudice, that is, a ‘reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” (*People v. Ledesma, supra*, 39 Cal.4th at p. 746.) However, it is not necessary to determine “‘whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.’” (*In re Fields* (1990) 51 Cal.3d 1063, 1079; *In re Welch* (2015) 61 Cal.4th 489, 516.)

Trial counsel may well have had a tactical reason for failing to request such an instruction, and more generally for failing to pursue a heat of passion theory of voluntary manslaughter. Trial counsel could reasonably have concluded that focusing on appellant’s statements and testimony that he was afraid of the victim made him a more sympathetic person to the jury, even if that fear was unreasonable. Counsel might have believed that suggesting appellant was angry or experiencing some other negative emotion would not be compatible with fear and would alienate the jury.

Further, there is no reasonable probability that the appellant would have received a more favorable outcome if trial counsel had requested and obtained an instruction. When considering provocation in the context of degrees of murder, the question is whether the defendant was actually (although unreasonably) provoked. Specifically, “[t]he issue is whether the provocation precluded the defendant from deliberating. (See CALJIC No. 8.20.) This requires a determination of the defendant’s subjective state.” (*People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1295.) As we discuss above, the jury was instructed to consider whether appellant acted “under a sudden heat of passion or other condition precluding the idea of deliberation” and whether he acted on “a mere unconsidered and rash impulse” rather than from judgment. The jury found appellant acted with premeditation and deliberation and so necessarily found appellant did not act under heat of passion or a condition precluding deliberation. Further, as we also discuss above, the evidence of premeditation and deliberation was very strong.

III. *It Is Not Reasonably Probable Appellant Would Have Received a More Favorable Outcome If Details of His Prior Convictions Had Been Excluded.*

In 1981, appellant was convicted of three counts of armed robbery involving a single incident, and in 1988, he was convicted of two counts of attempted murder, involving two separate victims during a single incident. He was released from prison in 1999 and completed parole in 2002. Appellant lived a crime-free life from 1999 until the present offense in 2017. Appellant contends the trial court abused its discretion in admitting

evidence of the robbery and attempted murder convictions to impeach him and to show a character trait for violence.

A. The Trial Court's Rulings

Before trial, the prosecutor told the court that pursuant to section 1103, the defense intended to “introduce character evidence of our victim by way of violence, either through drug use that imports violence or potentially direct violence. They talked about calling a gang expert.” The court asked defense counsel if he intended “to bring out any violent character of the victim in this matter” and counsel replied, “Yes.” The court then told defense counsel that section 1103 “would allow the People to present evidence of the defendant’s violence after the defense puts on evidence of the victim’s violence” including evidence of appellant’s prior attempted murder convictions. The court also indicated that if appellant elected to testify, the court would hold a hearing to determine whether appellant could be impeached with his prior convictions.

Appellant introduced evidence of methamphetamine metabolites found in the victim’s blood, but did not introduce evidence of the effects of that drug. Defense counsel showed Valencia photographs of the victim, in which he was wearing red and making a gang sign for West Side. Counsel also showed Valencia a photograph containing two hats, a big chain necklace, a watch, and a gun. Valencia denied Young was a gang member and also denied that the objects in the photograph belonged to Young.

Before the end of the prosecution’s case-in-chief, the court held a hearing on the admissibility of appellant’s prior convictions as impeachment evidence if he testified. After both parties argued this issue, the prosecutor added “in terms of the

self-defense aspect that [defense counsel] raised, I would also just throw in it would be part of our [section 1103] argument as well.” The prosecutor continued, “in specific detail as to why the attempted murder would be relevant, that case could even be proved if we demonstrate beyond a reasonable doubt that the defendant did not act in self-defense in that his need to use malicious deadly force two times in the past and the third time there is death, I think, is something that’s certainly relevant for the jury to consider.”

The trial court discussed the remoteness of the convictions for use as impeachment evidence, and stated it did not consider appellant’s convictions “so remote as to warrant exclusion if other factors apply.” The court listed the general factors to be considered, and stated: “The issue here goes beyond credibility, however. Should the defendant testify, I take counsel at his word that he will be testifying consistent with the offer of proof that would bring into play Evidence Code section 1103, which I have already ruled would come out as the defendant would be testifying to the prior bad acts or bad acts; that is, of the victim in this matter. [¶] And taking all matters into consideration, utilizing the balancing process, as I have been doing since I started speaking, I do hold that should defendant testify, he will be allowed—the People will be allowed to utilize all five of these prior convictions, not only for the purposes of impeachment, for purposes of Evidence Code section 1103. That will be the ruling.”

Defense counsel replied: “Exclude 1103. I’ve indicated I do not plan to call the expert and go into the fact that the victim was a gang member. We have offered no evidence of that. We just marked some photographs—[¶] . . . [¶]—that were identified.” The court replied: “I understand that. But apparently your client

is going to testify under a certain state of mind, as to which I'm taking from your offer of proof in your opening statement. My ruling stands." Defense counsel responded: "As to that state of mind, I don't believe he is going to say that he knew this person was a gang member. I think he is going to testify he was in fear of his life and the way the person was acting aggressively toward him." The court replied: "No. I understand. My ruling stands."

B. Section 1103

"Evidence Code section 1103 contemplates that character evidence comprises something other than evidence of conduct at the time in question, because character evidence is used to show the person acted 'in conformity with' his or her character. (Evid. Code, § 1103, subd. (b).) Wigmore, on whose treatise Evidence Code section 1103 is based [citation], notes the relevance of character evidence is premised on a continuity of character *over time*: "Character at an earlier or later *time* than that of the deed in question is relevant only on the assumption that it was substantially unchanged in the meantime, i.e. the offer is really of *character at one period to prove character at another . . .*"' (*People v. Shoemaker* (1982) 135 Cal.App.3d 442, 448 [185 Cal.Rptr. 370], quoting Wigmore, second italics added, some italics omitted.) If evidence of a victim's conduct at the time of the charged offense constitutes character evidence under Evidence Code section 1103, then every criminal defendant claiming self-defense would open the door for evidence of his own violent character. Evidence Code section 1103 cannot be read so broadly." (*People v. Myers* (2007) 148 Cal.App.4th 546, 552–553.)

C. Harmless Error

We see no reasonable probability appellant would have received a more favorable outcome if the convictions or the details of the convictions had been excluded or the nature of the attempted murder convictions sanitized, or all three. Appellant was free from prison custody for 18 years before this case, and appellant presented evidence to support his contention that he was a changed man. If the details of the convictions showed appellant to have been a wild young man involved with drugs and bad companions, appellant testified he found religion his second time in prison and emerged a different man. He suffered no criminal convictions in the 18 years following his release from prison. He married, had a child, started a business, and purchased a home. Thus, the prejudicial potential of the details of the convictions was not strong.

In contrast, as we discuss throughout this opinion, the evidence of premeditation and deliberation was very strong in this case. The jury viewed a videotape of the killing, which was akin to an execution-type killing. It would be difficult for any defendant to overcome the video evidence alone, but that was not the only unfavorable evidence. As we also discuss, there was also evidence strongly supporting an inference of planning; there was no evidence Young had a gun; and appellant fled the scene and changed his appearance. The totality of this evidence of guilt would be extremely difficult, if not impossible, for any defendant to overcome. We cannot find it reasonably probable that appellant would have been able to overcome this evidence and obtain a more favorable outcome if the fact of, the details of, or the nature of his prior convictions had been excluded.

IV. *Defense Counsel Was Not Ineffective in Responding to the Trial Court's Ruling Admitting Appellant's Prior Convictions.*

Appellant contends his trial counsel was ineffective in addressing his prior convictions once the court ruled them admissible. He contends counsel should have asked the court to exclude details of the prior convictions; requested a limiting instruction similar to CALCRIM No. 852; and conducted his direct examination of appellant on this topic differently. We review appellant's claim in accordance with the rules set forth in section II above.

A. *Exclusion of Details*

A request to exclude details of the prior convictions would have been futile. It was not merely the fact of the prior convictions which was admissible under section 1103 to show a character trait for violence, but the facts underlying those convictions. Counsel's failure to make a futile or unmeritorious motion or request is not ineffective assistance. (See *People v. Price* (1991) 1 Cal.4th 324, 386–387.) Further, as we discuss in section III above, it is not reasonably probable appellant would have received a more favorable outcome if the evidence had been excluded or the nature of the attempted murder conviction sanitized, or both.

B. *Limiting Instruction*

The limiting instruction appellant suggests would have told the jury that the convictions were admitted for the limited purposes of determining whether appellant had a character trait for violence and for judging witness credibility; the fact of the convictions themselves were not sufficient to prove appellant was

guilty of murder; and the People were still required to prove every element of the charged crimes beyond a reasonable doubt. Appellant states this instruction is modelled on CALCRIM No. 852.

We conclude counsel could have made a reasonable tactical decision not to request such an instruction because it directly told the jury that the convictions could be used to show a character trait for violence. This is a particularly likely scenario given that other instructions told the jury the prior convictions had been admitted for two limited purposes: 1) assessing witness credibility (CALJIC No. 2.23) and 2) to prove a single element of the section 29800 firearm charge (CALJIC No. 12.48.5). CALJIC No. 12.48.5 told the jury “You must not be prejudiced against a defendant because of a prior conviction. You must not consider that evidence for any purpose other than for establishing a necessary element of the crime charged unless you are otherwise instructed.”

Assuming for the sake of argument counsel was ineffective in failing to request a modified version of former CALCRIM 852, there is no reasonable probability appellant would have obtained a more favorable outcome if such an instruction had been given. The instructions that were given conveyed to the jury that appellant’s convictions could only be used for very limited purposes. The jury was also instructed generally that the prosecution bore the burden of proving every element of the homicide offenses beyond a reasonable doubt. Giving a modified version of former CALCRIM 852 would not have made a difference.

C. Questioning of Appellant

On direct examination, appellant was asked very broad questions about his prior convictions. With respect to the prior robbery convictions, his counsel asked: “Tell us what happened there?” Appellant replied “I was living a life of crime and robbed a bar, meeting some associates.” Counsel asked how many associates were involved, and clarified that they robbed bar patrons. Counsel did not ask appellant if he or his associates were armed. On cross-examination, the prosecutor did ask if they were armed, and appellant replied they were.

Similarly, with respect to the attempted murders, counsel asked, “Tell us what happened there?” Appellant replied, “[I]n 1986 a friend of mine and myself, we got in a altercation with a couple of individuals. We were drunk, intoxicated, using drugs, in guilty that environment. A disagreement or argument went bad and we got into a confrontation.” Counsel asked if there was “a stabbing then” and appellant replied, “Yes.” On cross-examination, the prosecutor brought out the fact that appellant or his companion stabbed not only the person they had the initial disagreement but a woman who asked them to stop the attack.

Appellant contends his counsel should have elicited more details from him on direct examination to prevent the prosecutor from eliciting those details and creating the impression appellant was deceitful or “cavalier.” Appellant points to his testimony that “I answered [the] questions that my attorney asked me” as showing he believed that counsel was responsible for eliciting the details of the crimes.

There is nothing in the record on appeal suggesting appellant was precluded from providing much more detail in response to his counsel’s suggestion that he “tell us what

happened there.” Given appellant’s terse replies to counsel’s open-ended questions, it is possible appellant did not want to provide more details or did not believe that the details were important. Appellant’s later statement to the prosecutor that there was no real difference between robbery and armed robbery and his accompanying demeanor support this inference. Defense counsel may have made a reasonable tactical decision not to pressure appellant to provide more details by asking more follow up questions. If, for example, counsel had asked appellant about the use of a firearm in the robbery and appellant had displayed the same attitude toward that fact as he did on cross-examination, appellant would not have created a more favorable impression on the jury. Thus, appellant has failed to show prejudice.

V. *Appellant Has Not Shown Defense Counsel Was Ineffective in Responding to the Late-Disclosed Police Body Camera Evidence.*

Near the end of the People’s case-in-chief, the prosecutor turned over 8 to 10 hours of footage from police body cameras; the prosecutor represented he had received the footage that morning and had not reviewed it. The trial court offered to send the jury home and give defense counsel the rest of the day to review the footage, but counsel declined. Trial continued and appellant called his neighbor Majeed. The prosecutor then called Officer Sandoval, out of order, as a rebuttal witness. Officer Sandoval had interviewed Majeed and had been wearing a body camera at the time. The officer’s testimony cast doubt on Majeed’s account of events. Appellant contends his counsel was ineffective in calling Majeed without reviewing the prosecution’s late-disclosed

body camera evidence. We review appellant's claim in accordance with the rules set forth in section II above.

A. Testimony of Majeed and Officer Sandoval

Majeed testified he was in his living room and heard a man he did not know yelling down the street about someone disrespecting his sister. Majeed looked out his front door and saw Young "walking pretty aggressively" while saying "You don't talk to my sister like that. You don't disrespect my sister." After Young was out of Majeed's sight, Majeed heard several gunshots. Majeed did not watch Young after Young passed his house and did not see the shooting. Majeed testified he had to go to work that day and only spoke with police officers to arrange a future interview; he did not recall speaking to them about the shooting itself.

In rebuttal Officer Sandoval testified he did speak with Majeed about the shooting at the crime scene and he filled out a field identification card that Majeed reported he heard three to four gunshots. The prosecutor then asked: "And did [Majeed] report where he was as well? Was that reported on the form?" Officer Sandoval replied, "No." The prosecutor asked, "Does it say in this form, 'The subject was in the back of house?'" Officer Sandoval replied: "Yes." The prosecutor continued, "So that's what he reported to you about where he was?" Officer Sandoval again replied, "Yes."

The prosecutor also asked if Majeed provided "any other details to you that you recall about somebody walking in an aggressive manner" or "anything about yelling things out up the street [or] watching people come up the street." Officer Sandoval replied, "I don't recall" to both sets of questions. The prosecutor then asked Officer Sandoval if he reviewed footage of the

interview with Majeed and if it was correct that the officer did not have “any recollection, even after that review, of him saying anything about somebody walking aggressively” or “anything about yelling or an argument coming up the street that he responded and looked out the window?” Officer Sandoval agreed it was correct.

On cross-examination, defense counsel asked if Officer Sandoval had asked Majeed “anything about what he was doing before he heard the shots” and the officer replied, “No.” Defense counsel also asked: “[a]nd your body cam, does it show that he told you that he was in the back when the shots—when he heard the shots?” The officer replied, “I don’t recall exactly.” Defense counsel asked, “And you had a chance to review the body cam today?” The officer agreed. Defense counsel then asked: “Now, nobody, to your knowledge, if you remember, asked him, did you see, or what did you see before you heard the shots?” Officer Sandoval responded, “Not at the time.”

B. Appellant Has Not Overcome the Strong Presumption That His Counsel’s Actions Were Sound Trial Strategy.

Defense counsel might have had a sound tactical reason for proceeding. Majeed was the only witness who heard the victim yelling argumentatively at appellant before the shooting and so was a key witness. Majeed apparently needed to be at work by 11:00 a.m. the day the footage was produced, and defense counsel might well have wished to accommodate his schedule. Majeed testified he did not speak to police at the scene about the shooting, and it is reasonable to infer counsel was aware of Majeed’s position on this. Thus, counsel could reasonably have

believed there was no risk in calling Majeed without viewing the footage.

Further, we do not agree it is reasonably probable that the jury attributed any dishonesty by Majeed to appellant or his defense and so harmed appellant's defense. There is nothing to suggest appellant had any awareness of Majeed's location just before or during the shooting and so must have known the testimony was false. Majeed's testimony about the victim's statements was helpful to appellant, but if Majeed were going to perjure himself at appellant's suggestion his testimony could have been much more helpful. For example, he could have, but did not, corroborate appellant's testimony that the victim threatened to teach him a lesson. There are several other more likely explanations for any discrepancies in Majeed's pre-trial statements and his trial testimony: he might not have wanted to get involved initially and so chose not to reveal his knowledge to police; he might have decided to "help" appellant on his own initiative; he might have fled to the back for safety after seeing and hearing the victim and been embarrassed to admit it; or he might simply have become confused over time about what he personally saw and heard then as opposed to what he learned later.

Further, while there was some prejudice to appellant from the footage because it had some tendency to undercut Majeed's testimony, the footage also had some positive value as well. The strongest impeachment of Majeed came from the field identification card, which Officer Sandoval testified showed Majeed said he was in the back when he heard the shots. The footage helped undercut the officer's testimony on this key issue. Officer Sandoval testified that even after reviewing the footage

he did not “recall exactly” if that footage showed Majeed telling officers he was in the back when he heard the shots. In light of Sandoval’s other testimony, this answer is reasonably understood as an admission that Majeed did not make such a statement.⁶

In addition, as appellant acknowledges, defense counsel made a quite effective point on cross-examination of Officer Sandoval. Counsel asked Officer Sandoval if officers had asked Majeed what he saw before the shooting. Sandoval replied they did not ask at that time. This not only helped to rehabilitate Majeed, it also called into question the thoroughness of the crime scene investigation. It showed that although Majeed was appellant’s next-door neighbor and was home at the time of the shooting, police officers did not bother to ask him what he saw before he heard the shots. Given the mixed effects of the video footage, we see no reasonable probability appellant would have received a more favorable outcome if his trial counsel had reviewed the footage before calling Majeed as a witness.⁷

⁶ Officer Sandoval previously testified he did not recall Majeed saying anything about the victim walking aggressively or yelling or an argument, which both the prosecutor and defense counsel apparently understood as testimony that Majeed did not make such statements in the footage.

⁷ In making this assessment, we reject appellant’s suggestion his counsel should have asked Officer Sandoval if any of the officers had asked Majeed what he *heard* before the shooting. There is no way, on the record before us, to know what Sandoval’s response would have been. It could have been unfavorable to appellant.

VI. *Appellant Has Not Shown Prejudice from Defense Counsel's Decision to Stipulate to Late-Disclosed Evidence of Valencia's Prior Convictions*

After Valencia testified, the prosecutor disclosed Valencia had suffered two prior convictions involving moral turpitude. Defense counsel and the prosecutor agreed to stipulate that Valencia had suffered the convictions; the stipulation was read to the jury before appellant testified. Appellant contends his counsel was ineffective in failing to request a mistrial based on this late disclosure or alternatively in failing to recall her to the stand to impeach her with her prior convictions. We need not determine whether counsel's performance was deficient, because this claim fails for lack of prejudice. (See *In re Fields*, *supra*, 51 Cal.3d at p.1079; *In re Welch*, *supra*, 61 Cal.4th at p. 516.)

The jury was informed of the prior convictions and was instructed generally to consider a witness's prior felony convictions in assessing the witness's credibility. Valencia's convictions were for burglary and grand theft and both occurred on September 9, 2008. Appellant has not shown that the underlying facts of those convictions were relevant or would have portrayed Valencia in a more negative light than the fact of the convictions themselves. The jury heard the stipulation at the end of the day on December 5, 2018; appellant testified on his own behalf the next day and the parties began their closing arguments. Thus, when the jury heard appellant's version of events, they were aware Valencia was a convicted felon. As appellant acknowledges, defense counsel was able to incorporate this fact into closing argument. There is simply no basis to conclude the timing of the disclosure was prejudicial, a mistrial would have been warranted, or it is reasonably probable that

earlier disclosure of the convictions or recall of Valencia to the witness stand would have resulted in a more favorable outcome for appellant. It is appellant's burden to prove prejudice and he has failed to do so.

VII. *Appellant's Additional Claims of Ineffective Assistance of Counsel Fail.*

Appellant groups together seven other instances of claimed ineffective assistance of counsel. We find no merit to any of the claims, as set forth in more detail below. Appellant acknowledges he suffered no prejudice from some of the described instances, but simply takes issue with his counsel's handling of those instances. In evaluating an ineffective assistance of counsel claim, we accord great deference to counsel's tactical decisions. (See *People v. Mickel* (2016) 2 Cal.5th 181, 198.)

A. *"Concession" of Guilt During Opening Argument*

Appellant contends his counsel was ineffective in failing to remember the court's admonition to inform the court before conceding appellant's guilt on the possession of a firearm charge. Counsel did not concede guilt by referring to appellant's possession of a gun in opening statement. At most he conceded one element of the charge, and this is not tantamount to a guilty plea which requires waivers from a defendant. Moreover, there was no dispute at all that appellant possessed a gun: the surveillance video clearly showed appellant holding and firing a gun. Defense counsel at most previewed appellant's explanation for that possession; that preview was not evidence. As appellant acknowledges, there was no prejudice from the opening statement remarks. Appellant's claim that this instance was "part of the overall and cumulative erosion of the defense case" is

unsupported by argument or legal authority and should have been raised, if at all, as part of a cumulative error argument.

B. Questioning About Appellant's Use of a Cane

Appellant contends his counsel was ineffective in failing to review the preliminary hearing transcript before asking McGowan at trial about whether he had seen appellant use a cane. McGowan testified at the preliminary hearing he had never seen appellant use a cane and repeated that testimony at trial. We agree, based on the record on appeal, there is nothing to suggest a tactical purpose to ask such a question and a reasonable attorney would not have asked it. Appellant is correct Valencia had testified at the preliminary hearing that he used a cane when he walked over to her house with his wife and that defense counsel did not ask her about the cane at trial. Unlike, McGowan, however, Valencia was a witness to the shooting, and if defense counsel had asked her about the cane during the earlier visit, he would have opened the door to questioning about appellant's use of a cane at the time of the shooting. Surveillance video did not show appellant using a cane at that time. Counsel might reasonably have decided not to question Valencia on this topic and thereby highlight the video evidence.

Moreover, there was no prejudice from trial counsel's handling of these two witnesses on this topic. Appellant's nephew testified about the beating appellant received from gang members and the resulting injury to appellant's leg; appellant testified he had recently begun to use a cane again; a still photograph shows a cane on the ground at the scene; and Detective Dilkes testified the photograph was accurate. At the same time, the surveillance video showed appellant moving without a cane. Thus, the evidence, as a whole, showed appellant

used a cane intermittently. Neither McGowan's actual trial testimony nor Valencia's potential trial testimony could significantly alter that picture. The jury viewed the video and could judge for itself how well appellant moved without a cane. There is no reasonable probability appellant would have received a more favorable outcome if counsel had questioned the two witnesses as appellant now suggests.

C. Brief Exclusion of Appellant's Wife from the Courtroom

Outside the presence of the jury, the trial court stated appellant's wife, Rogers, had been shaking her head in the negative during Valencia's testimony and so would be excluded from the courtroom "as long as she is a witness." The court explained: "She is communicating to the jury by shaking her head in the negative. I will not have that. She is excluded." Defense counsel apologized for the behavior and asked the court to reconsider because she had not intended to reveal her emotions. The court denied the request. During this discussion, appellant spontaneously began to address the court. Before he spoke five words, the court admonished him: "Sir, do not address me." Appellant stated: "My attorney [is] going to address you." The court said, "Sir" and appellant said, "Excuse me." Defense counsel then stated, "Mr. Henderson is reminding me the court's indicated that it instructed the People, if they plan to call Ms.

Henderson, to call her first.”⁸ The court agreed to revisit the matter at the end of Valencia’s testimony.

There is nothing in the record to suggest defense counsel would not have responded had appellant spoken to him directly and quietly. Indeed, they did speak together after the trial court admonished appellant and counsel brought appellant’s issue to the attention of the court. Appellant does not explain what detriment he suffered from the trial court’s mild rebuke outside the presence of the jury, and we see none. Only a few seconds passed between the trial court’s denial of counsel’s request for Rogers to remain in the courtroom and the court’s agreement to reconsider the matter. Even after the court was reminded of its ruling, the court elected to defer a decision until the end of Valencia’s testimony. There is nothing to remotely suggest that the court punished appellant for speaking up. Rather, as the court made clear, it was Rogers’s inappropriate behavior during the first part of Valencia’s testimony which led to Rogers’s exclusion for the remainder of that testimony. The court then allowed her to return once that testimony was complete.

In his reply brief, appellant acknowledges that this instance was not prejudicial and argues that it “should be considered in light of the prosecutor’s continuing harassment and trial counsel’s continuing failure to effectively oppose it.” Again,

⁸ This was not in fact the court’s full ruling. The court stated that the prosecution had the option of either calling her as their first witness or permitting her to be in the courtroom before she testified and commenting on her presence when she was called as a witness.

this should have been raised, if at all, as part of appellant's cumulative error argument.

D. Appellant's "No Help" Comment

Appellant contends his counsel was ineffective in failing to object on the ground of prosecutorial misconduct on two occasions when the prosecutor engaged in "antics . . . orchestrated to anger and upset appellant to make him look bad in front of the jury." Appellant contends the prosecutor falsely accused him of threatening the trial judge and questioned appellant about his demeanor when appellant said there was not a big difference between robbery and armed robbery.

At one point during cross-examination, appellant stated: "Is this the same question I answered? [¶] No help." The court said: "I'm sorry. Was that directed at me? I asked you a question, sir. Was that directed at me? Answer my question." Appellant replied: "I said if it was—No, it wasn't directed at you. And if I'm directing something at you, I'll tell you and you will know it." The prosecutor then asked appellant if he was "threatening the judge?" Appellant replied he was not. The prosecutor continued to question appellant about the exchange, and then asked, "Well, sir, you understand you are in the middle of a jury trial, right?" Appellant replied he did. The prosecutor then asked, "You understand there is people in this box?" Appellant again replied he did. The prosecutor started to repeat the same question and defense counsel objected that it was argumentative. The court overruled the objection. The prosecutor asked yet another question about the exchange and defense counsel again objected that the question was argumentative. This objection was sustained.

Soon thereafter, the prosecutor asked appellant if he had “left out a detail” when he admitted his robbery conviction, specifically that it was armed robbery. Appellant replied: “Yes, it’s a armed robbery. Robbery, arms, robbery.” The prosecutor responded: “You are smiling now. You think it’s funny?” Appellant started to reply in the negative, but the prosecutor interposed, “[w]hy don’t you tell [the] jury why you are smiling?” Defense counsel objected that the question was argumentative, but the objection was overruled. Appellant explained that he did not think the difference was a big deal.

We do not agree the prosecutor deliberately attempted to anger and upset appellant in front of the jury and so committed misconduct. Appellant was already angry when he replied to the court. Defense counsel did object to the prosecutor’s line of questioning. The trial court overruled the objection.⁹ We see no prejudice to appellant from the trial court’s failure to sustain the objections.

In the first exchange, appellant’s reply to the court’s question was disrespectful and would reasonably be understood by most people as an attempt to silence the judge. It was in no way prompted by the prosecutor. It was not inappropriate for the prosecutor to inquire what appellant meant by his extraordinary statement and appellant in fact took advantage of the question to walk back the statement. If the prosecutor’s two additional questions about appellant’s awareness of being in a jury trial

⁹ If, as appellant claimed, the “no help” remark and its accompanying anger was not directed at the court, then it must have been directed at defense counsel.

were, as defense counsel objected, argumentative, appellant answered those questions appropriately. We see no prejudice to appellant from the questions.

In the second exchange, the prosecutor's questions to appellant about smiling were generally appropriate. A witness's demeanor while testifying is an appropriate factor for the jury to consider when evaluating the witness's credibility. Appellant replied to the substance of the question without discernible anger or emotion.

In his reply brief, appellant suggests the real harm from this exchange is that he knew he could not rely on his counsel "to protect him from the prosecutor's harassment" and so felt "he had to speak for himself." Appellant's frustration with his trial counsel's trial strategy, and his belief that his own strategy was superior, have no relationship to whether counsel's performance was objectively reasonable, or whether appellant would have received a more favorable outcome in the absence of an objective deficiency.

E. Questioning of the Defense Gang Expert

Appellant contends trial counsel was ineffective in failing to object to the prosecutor's cross-examination of the defense gang expert on the elements needed to prove a gang enhancement allegation pursuant to section 186.22; no such allegation was charged in this case. He also claims his counsel was ineffective when he questioned the defense gang expert about a "Robin" tattoo.

Defense counsel may choose not to object for a number of reasons, and it is seldom ineffective assistance of counsel. (See *People v. Ghent* (1987) 43 Cal.3d 739, 772 ["a mere failure to object to evidence or argument seldom establishes counsel's

incompetence”].) Here, counsel could reasonably have made a tactical choice to address this issue at a later point. The prosecutor’s questions about gang allegations used the expert’s former duties as a law enforcement officer as a springboard, culminating with a question about whether the expert would bring the present case to the district attorney’s officer as a gang enhancement. The expert said he would not. The expert then himself did a very good job of explaining to the prosecutor that he had been hired for a more limited purpose for this case. He was not asked to do any further investigation or to prepare a report, but just to answer “some simple questions and that would be it.” On redirect, defense counsel emphasized the limited nature of the expert’s assignment, asking: “I did not ask you to make a case for Mr. Young being a gang member, did I?” The expert replied, “No.” Counsel then asked: “I asked your opinion as to whether or not—well let me rephrase that. [¶] Do you think if a person is throwing gang signs, wearing gang colors, that there is a likelihood that he is associated with a gang?” The expert replied, “Yes.”

Appellant also contends defense counsel was ineffective in asking his expert on re-direct if he knew of a gang called the Robins in Visalia, where the victim had previously lived. He claims this undermined the credibility of the defense expert’s opinion that the victim was a gang associate. It was the prosecutor who first asked the expert if he thought “Robin” was a gang tattoo. The expert replied: “I mean I don’t, based on this I don’t. But, you know, again, without having other factors or knowing what gang is in that particular area, you know, Robin could be a bird, it could be part of ‘the Swans,’ you know. So, but based on that, I mean, just that in itself, no.” In light of this

testimony, defense counsel made a reasonable tactical decision to clarify on redirect that his expert was not familiar with all the gangs and their subsets in Visalia and so did not know if there was a gang there called the Robins. Thus, if anyone undermined the defense expert's opinion, it was the expert himself.

F. Probation Report Error

Appellant contends trial counsel was ineffective in failing to correct the entry in the probation report showing that appellant had previously been convicted of murder; appellant's prior conviction was for attempted murder. Appellant has not shown that the prosecutor or the trial court was confused by the misstatement in the report. Appellant's prior convictions were an issue before and during trial and all discussions of the convictions correctly identified them as attempted murder convictions. Appellant has failed to show prejudice from the inaccurate entry.

G. Failure to Request the Court Strike the Firearm Enhancement

Appellant contends his trial counsel was ineffective in failing to ask the court to strike his firearm enhancement. We see no reasonable probability the trial court would have granted this request. The trial court denied appellant's motion to strike one of his prior strike convictions and the prior serious felony convictions. In doing so, the trial court stated: "I do take note of the horrendous facts in this matter. I note that the defendant was convicted of robbery with a firearm in 1991." The court continued: "As to the strike law, I cannot say based on the factors of this case and the particulars of the defendant's background that he's outside the spirit of the scheme of [the] three strikes law." The court's ruling resulted in a sentence of 100 years to

life, plus 15 years in prison. Thus there is no reasonable probability that the trial court would have granted a request to strike the firearm enhancement. Phrased differently, the court's rulings and comments are a "clear indication" it would not strike the enhancement "in any event." (See *People v. Chavez* (2018) 22 Cal.App.5th 663, 713 [assessing need for remand for court to consider exercise of newly acquired discretion to strike a firearm enhancement].)

VII. ***There Is No Cumulative Error Requiring Reversal.***

Appellant contends the prosecutor's theory that appellant planned to kill whomever came after him as a result of Valencia's phone call was not believable, and so the prosecutor "won" the conviction through "cheating." He contends this cheating, combined with trial court error and ineffective assistance of defense counsel, rendered his trial fundamentally unfair and left the jury with no alternative but to convict appellant of first-degree murder.

As we have noted throughout this opinion, the shooting in this case was captured on video, and that video showed a brutal execution-style killing by appellant as the victim lay seemingly incapacitated on the ground. Such a video is extremely difficult for a defendant to overcome. In this case, the record on appeal lacks evidence in support of appellant's claims of self-defense, fear, or heat of passion which is as compelling as the video. The jury did have the clear option to convict appellant of second degree murder if it believed he acted from heat of passion, rashly, or impulsively. It rejected that option.

Viewing counsel's alleged errors individually and cumulatively, we do not find it reasonably probable appellant would have received a more favorable outcome absent all the

errors he has described. (See, e.g. *People v. Scott* (2015) 61 Cal.4th 363, 408 [no reversible error considering the claims cumulatively where any individual errors were not prejudicial].)

IX. *The Abstract of Judgment Must be Amended.*

At sentencing, the court denied appellant's request to strike his three serious felony priors for purposes of Penal Code section 667, subdivision (a) and the Three Strikes law. On Count 1, the court stated it was imposing sentence under "option triple i[]" of the Three Strikes law, and then stated the sentence was 75 years to life, plus an additional 15 years for the priors pursuant to section 667, subdivision (a)(1), for a term of "90-years-to-life" plus an additional and consecutive 25 years to life for the gun enhancement under Penal Code section 12022.53, subdivision (d). The abstract of judgment reflects a sentence of 90 years to life plus an additional 25 years to life for the gun use enhancement.

Appellant contends the trial court incorrectly treated the three 5-year terms for the Penal Code section 667, subdivision (a)(1) prior convictions as an indeterminate term of 15 years to life rather than a determinate term of 15 years. He claims the trial court should have imposed an aggregate sentence of 100 years to life plus 15 years, rather than 115 years to life. Respondent agrees and so do we.

When sentencing under the Three Strikes law, the calculation requires the court to undertake a two-step process. First, the court must calculate "the greatest minimum term" from three sentencing options set out in Penal Code sections 667, subdivision (e)(2)(A) and 1170.12, subdivision (c)(2)(A). Second, the court must add any applicable enhancements to the sentence.

To comply with the first step, the court had to choose the greatest minimum term from the following three statutory options (Pen. Code, §§667, subd. (e)(2)(A) & 1170.12, subd. (c)(2)(A)):

- (i) Three times the base term for the current crime (here, a minimum term of 75 years to life);
- (ii) 25 years to life (here, a minimum term of 25 years to life) or
- (iii) Traditional sentencing using the normal determinate and indeterminate sentencing procedures (here, 25 to life for first degree murder, plus 25 years to life for the Penal Code section 12022.53, subdivision (d) gun use enhancement and 15 years for the three prior convictions, for an aggregate minimum term of 65 to life.)

Comparing these results, it is apparent that option (i) provides the greatest minimum term, 75 years to life. Ironically, this is the term the court initially pronounced. It erred, however, in its next step, when it calculated the term of imprisonment as 90 years to life when adding the three 5-year determinate terms for the Penal Code section 667, subdivision (a)(1) priors. The section 667, subdivision (a)(1) terms are determinate. The correct sentence is an indeterminate term of 100 years to life, plus 15 years, comprised of the base term of 75 years to life, plus 25 years to life for the gun use enhancement (Pen. Code, § 12022.53, subd. (d)), plus 15 years determinate for the three section 667, subdivision (a)(1) priors. The abstract of judgment should be amended to reflect this sentence.

We also note that as to count 2, felon in possession of a firearm, the court should have imposed the three 5-year Penal Code section 667, subdivision (a) enhancements consecutive to the term in the base count, since the court previously indicated it did not intend to strike the priors. In multiple-count, third strike sentencing cases, status enhancements such as section 667, subdivision (a) must be imposed (or stricken) on each indeterminate count and once for any determinate portion of the sentence. (*People v. Misa* (2006) 140 Cal.App.4th 837, 846; *People v. Williams* (2004) 34 Cal.4th 397, 403–404.) The abstract of judgment should be amended to reflect the imposition of the three 5-year priors on the concurrent sentence in count 2.

DISPOSITION

This matter is remanded to the trial court with instructions to prepare an amended abstract of judgment showing appellant's correct sentence on count 1 as 100 years to life plus 15 years and on count 2 as a concurrent middle term of four years with three consecutive five-year enhancements pursuant to Penal Code section 667, subdivision (a)(1) as indicated in this opinion. The court is directed to forward a copy of the amended abstract to the Department of Corrections and Rehabilitation. The judgement is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

STRATTON, J.

We concur:

BIGELOW, P. J.

GRIMES, J.